

CW Associates, d/b/a CW Storage and International Brotherhood of Teamsters, Local 294, AFL-CIO. Case 3-CA-18510

September 30, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

Upon a charge filed by the Union on April 8, 1994, an amended charge filed on May 9, 1994, and a second amended charge filed on May 25, 1994, the General Counsel of the National Labor Relations Board issued a complaint on May 26, 1994, against CW Associates, d/b/a CW Storage, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. By letter dated June 15, 1994, the Region notified the Respondent that unless an answer was filed before the close of business on June 22, 1994, a Motion for Summary Judgment would be filed. The Respondent's general manager responded in a letter dated June 17, 1994, to the Regional Office. In apparent answer to the complaint, the letter stated that "[t]he arrears in payments to the Teamsters Pension Fund and Health & Hospital Fund cannot be met under any schedule at this time." The letter further said, "Revenues are down 60% monthly. . . . [p]ayroll benefits, insurance and utilities leave us no cushion to settle any past due obligations."

On June 28, 1994, the General Counsel filed a Motion for Summary Judgment with the Board. On June 30, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent did not file a response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the National Labor Relations Board's Rules and Regulations states:

Answer to the complaint; time for filing; contents; allegations not denied deemed admitted— The respondent shall, within 14 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without

knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The Respondent's letter in response to the complaint does not meet the requirements for a sufficient answer set forth in Section 102.20 of the Board's Rules and Regulations. The Respondent's letter fails specifically to admit, deny, or explain any of the allegations in the complaint. To the extent that the letter raises a claim of financial inability to meet pension obligations in a collective-bargaining agreement with the Union, it is well established that such a claim does not present a legal defense to an allegation that an employer has unlawfully failed to abide by the agreement. E.g., *Stevens & Associates Construction Co.*, 307 NLRB 1403 (1992). In the absence of good cause being shown for the Respondent's failure to file a sufficient answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a partnership, with an office and place of business in Albany, New York, has been engaged in the operation of a cold-and-dry storage facility. During the 12-month period preceding issuance of the complaint, the Respondent in the course and conduct of its business operations had gross revenues in excess of \$1 million, of which an amount in excess of \$50,000 was derived from providing services to other employers located directly outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all times material, the Union has been the exclusive collective-bargaining representative, within the meaning of Section 9(a) of the Act, of the Respondent's employees in a unit of all warehousemen and working foremen employed at the Albany facility. This unit is appropriate for bargaining within the meaning of Section 9(b) of the Act.

The Respondent's recognition of the Union as the exclusive bargaining representative of the unit employees has been embodied in a series of collective-bargaining agreements between the Respondent and the Union, the most recent of which was effective by its terms for the period from March 7, 1991, to March 6, 1994.

Since about November 15, 1993, the Respondent has failed and refused to remit contractually required payments to the Union's pension fund. Accordingly, we

find that the Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about November 15, 1993, to remit contractually required payments to the Union's pension fund, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall order that the Respondent make unit employees whole by paying all contractually required contributions to the Union's pension fund that the Respondent has unlawfully failed to make since November 15, 1993.¹ In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).²

ORDER

The National Labor Relations Board orders that the Respondent, CW Associates, d/b/a CW Storage, Albany, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to make contractually required payments to the Union's pension fund for employees in the following unit:

All warehousemen and working foremen employed at the Albany facility.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

¹ Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide for payment of a fixed rate of interest on unlawfully withheld fund payments at the adjudicatory stage of a proceeding. We leave to the compliance stage the question whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. Any additional amounts shall be determined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

² Member Cohen would find that any reimbursement to employees for payments that employees have made to the pension fund would constitute a setoff to the amount that the Respondent owes to the pension fund.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole unit employees in the manner set forth in the remedy section of this decision, by making all contractually required contributions to the Union's pension funds that the Respondent has unlawfully failed to make and by reimbursing employees for any expenses ensuing from the Respondent's failure to make the required contributions, all in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Albany, New York, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent, shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to make pension fund payments which are required by our collective-bargaining agreement with International Brotherhood of Teamsters, Local 294, AFL-CIO, for employees in the following unit:

All warehousemen and working foremen employed at the Albany facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole unit employees by making all contractually required contributions to the Union's pension fund that we have unlawfully failed to make and by reimbursing employees for any expenses ensu-

ing from the Respondent's failure to make the required contributions.

CW ASSOCIATES, D/B/A CW STORAGE